Filed 6/5/19 P. v. Escalera CA4/3
(unmodified opinion attached)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HERIBERTO CONTRERAS ESCALERA, Defendant and Appellant.	G055492 (Super. Ct. No. 15CF1354) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING; NO CHANGE IN JUDGMENT

The opinion filed May 8, 2019, is ordered modified as follows:

On page 17, section 2, entitled "The Trial Court's Modification of CALCRIM No. 1600 Was Not Prejudicial Error," is deleted and a new section 2 is added that reads:

2. *The Trial Court's Modification of CALCRIM No. 1600 Was Not Prejudicial Error*

Escalera next claims the trial court committed error by adding language to the standard robbery jury instruction related to the meaning of "fear" in a robbery prosecution. We agree, but find the error harmless.

The trial court modified the standard robbery jury instruction (CALCRIM No. 1600) related to the "fear" element by adding: "Intimidation may be established by proof of conduct, words, or circumstances reasonably calculated to produce fear. *But it is not necessary that there be proof of actual fear, as fear may be presumed where there is just cause for it*." (Italics added.)

Adding the highlighted sentence, and creating a "presumption" in favor of the People regarding the fear element of robbery, constituted error. At oral argument the Attorney General acknowledged the problematic nature of this language, but argued the word "presumed" was the functional equivalent of "inferred." We disagree. To "presume" a fact is not the same as to "infer" the existence of that fact based upon the existence of other facts. Words matter. Precision matters. Confusing the two in an instructional context, and creating a "presumption" that benefits the People by lessening their burden of proof, constitutes error.

Even so, "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is '"whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process."'" (*Middleton v. McNeil* (2004) 541 U.S. 433, 437 (*McNeil*).) Thus, instructional error is examined based on a review of the instructions as a whole and in light of the entire record. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 (*Estelle*); cf. *Boyde v. California* (1990) 494 U.S. 370, 378 [an instruction may not be judged in artificial isolation].) "When an instruction is potentially ambiguous or misleading, the instruction is not error unless there is a reasonable likelihood that the jurors misunderstood or

misapplied the pertinent instruction." (*People v. Taylor* (2018) 19 Cal.App.5th 1195, 1205.)

In a petition for rehearing, Escalera cites several cases in support of his contention the instructional error here is not harmless. Each is distinguishable. *Neder v. U.S.* (1999) 527 U.S. 1, involved the complete absence of an instruction on an element of the offense. *People v. Mil* (2012) 53 Cal.4th 400, also involved the omission of an element. (*Id.* at p. 409.) *Connecticut v. Johnson* (1983) 460 U.S. 73 (plur. opn. of Blackmun, J.), addressed an instruction that "a person's [intent] may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act." (*Id.* at p. 78.) Here, the jury was instructed on all the elements of robbery, none was omitted, and the errant language did not create a conclusive presumption.

The jury was told that Escalera's use of force or fear to take the wallet, or to prevent J.D.1 from resisting or regaining it, was an element of the offense. The modified instruction did not alter that element. Indeed, had the modification created a permissive inference, and not used the word "presumption," it would not even arguably have run afoul of the constitution. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 527 (conc. opn. of Rehnquist, J.).)

"Harmless-error analysis addresses . . . what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome." (*Rose v. Clark* (1986) 478 U.S. 570, 582, fn. 11.) Under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), our inquiry is to determine whether "beyond a reasonable doubt . . . the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.) To do so, we must assess the effect of the error in light of the entire record. (*Sandstrom v. Montana, supra,* 442 U.S. at p. 527 (conc. opn. of Rehnquist, J.).)

Here, J.D.1 testified she was in actual fear during the incident.[3] Thus, there was direct evidence of fear, and this case was not one in which fear needed to be inferred—or "presumed"—circumstantially. J.D.1 also testified she was crying and shaking afterwards, and the delivery driver testified J.D.1 was screaming for help during the struggle with Escalera over the van's door. These facts confirm J.D.1's fear. Moreover, the evidence established Escalera used force to attempt to retain possession of the wallet during the "tug-of-war" over control of the van's door. This independent basis for conviction on a force theory shows the incorrect part of the fear instruction did not """so infect[] the entire trial that the resulting conviction violates due process."""" (*McNeil*, *supra*, 541 U.S. at 437.)

This case was neither close nor complicated. Considering all the circumstances of this case, the isolated error occasioned by the insertion of one erroneous sentence about fear into an otherwise correct jury instruction did not contribute to the verdict. Some trial errors are sufficiently tangential to the trial process that they fairly may be overlooked. (*Chapman*, *supra*, 386 U.S. at p. 22.) This is such an error. It was harmless beyond a reasonable doubt. And as such, trial counsel's failure to object to this instructional error was not prejudicial and therefore did not amount to ineffective assistance of counsel. (*Strickland, supra,* 466 U.S. at p. 691-692, 694.)

[3] "[Prosecutor]: At the time when this was happening . . . [¶] . . . [¶] [w]ere you scared? [¶] [J.D.1]: Yes."

This modification does not affect the judgment.

The petition for rehearing is DENIED.

GOETHALS, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.

Filed 5/8/19 P. v. Escalera CA4/3 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HERIBERTO CONTRERAS ESCALERA, Defendant and Appellant.	G055492 (Super. Ct. No. 15CF1354) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Patricia M. Ihara, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette C. Cavalier, and Michael D. Butera Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Heriberto Contreras Escalera of one count of second-degree robbery (Pen. Code, §§ 211 & 212.5, subd. (c).)[2] Following the verdict, Escalera admitted a prior strike allegation (§§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1)), and a prior prison commitment allegation (§ 667.5, subd. (b).)

Initially, the court sentenced Escalera to a seven-year term: three years for the robbery, doubled to six by the second-strike prior conviction, and a consecutive one-year term for the prison prior. Subsequently, Escalera brought a "Motion to Recall Sentences and Resentence Defendant [§] 1170(d)(1)." The trial court granted the motion, and vacated the seven-year sentence.

In resentencing, the court struck the strike prior and the prison prior, and imposed a subordinate one-year term (one-third the mid-term) for the robbery in the instant case. This term was to be served consecutive to the primary sentence in the unrelated companion case, Orange County Superior Court Case No. 15CF1073, to which Escalera had pled guilty and received a six-year, four-month sentence. Escalera's final sentence was therefore seven years and four months. He does not contest his sentence in this appeal.

On appeal, Escalera raises four claims: (1) his trial counsel was constitutionally ineffective for failing to object to portions of the prosecutor's closing arguments; (2) the trial court prejudicially erred by modifying the standard robbery jury instruction (CALCRIM No. 1600), and, alternatively, his trial counsel was ineffective for

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

failing to object to the modification; (3) the trial court prejudicially erred by instructing the jury with an inappropriate definition of "moral turpitude," and, again alternatively, trial counsel was ineffective for failing to object to this definition; and (4) cumulative error requires reversal, even if individual errors do not. We reject each of these claims and affirm the judgment.

FACTS

1. *Prosecution Case*

Grace R. was driving her two daughters to school one morning in June 2015, when she stopped at a convenience store to use an ATM. She parked her car in front of the store entrance, leaving her daughters, 9-year-old Jane Doe One (J.D.1) and 13-year-old Jane Doe Two (J.D.2), in the back seat. Waiting for their mother, the girls occupied themselves with their cellphones.

J.D.1 noticed a man she later identified as Escalera walk around his van, stop, and begin smoking a cigarette next to their car. Escalera lingered for a minute or so "kind of looking at" the two girls, although J.D.1 said she was unable to see his eyes. She felt this was unusual and told her sister he seemed "pretty shady." Her sister told her not to worry.

Escalera opened the car door, grabbed Grace R.'s wallet from the front seat, closed the door, and walked back towards his van. J.D.1 said Escalera did not look at her or her sister in the back seat as he took the wallet.

J.D.1 chased after Escalera. She grabbed the handle of the van door as Escalera "was about to close the door" and "pulled it back open." Escalera said, "I don't have anything." J.D.1 countered, "Yes, you do," and Escalera "kept on tugging on the door." J.D.1 continued to resist, and the two engaged in what she characterized as a "tug of war." When the prosecutor asked her "[w]ere you scared," J.D.1 answered "Yes."

J.D.1 was unable to get the door open because Escalera was stronger than she was. On the day she testified, J.D.1 was 11 years old, stood four-feet eleven-inches tall, and weighed 111 pounds. She was nine years old and smaller at the time of the crime.

During the struggle, J.D.1 called for help, imploring a nearby delivery driver to call 911. The driver testified he saw Escalera's van begin to move backwards while J.D.1 was holding onto the door, and he called the police.

Escalera eventually returned the wallet to J.D.1. J.D.1 testified she was crying and shaking. Escalera told her to go inside the store with her mom. J.D.1. found her mother, told her what had happened, and the two walked towards Escalera's van, which was about to leave the parking lot.

Escalera yelled back to Grace R., "I didn't do anything." J.D.1 testified he said "a woman took the wallet . . . and that he got it back and gave it to [J.D.1]." Grace R. told Escalera she was calling the police, and both she and J.D.1 took photos of the van's license plate.

The license plate information, along with surveillance video footage taken from inside the store, enabled police to identify, locate, and apprehend Escalera. By that time he had shaved off his moustache and eyebrows and had cut his hair.

After his arrest, Escalera was interviewed by Santa Ana Police Detective Adrian Silva. Escalera admitted he had been at the store and was involved in "some trouble with a little girl." Initially, he denied taking the wallet, telling Silva another man had stolen it; that man dropped the wallet and he picked it up and returned it to the owner's daughter. He could not explain why he did not immediately give the wallet back and admitted that he had taken it with him to his van.

Escalera then told Silva he had indeed been involved in a physical struggle to close the door while the girl was trying to get the wallet back. When Silva told

Escalera there was video of his van rolling backwards, he admitted the van had rolled back as the girl was standing next to it, before he gave her the wallet.

Following the interview, Silva showed J.D.1 a "six-pack" photo lineup, which included a recent photo of Escalera. J.D.1 identified Escalera, and she specifically noted how his eyebrows and moustache were different in the photo than they were at the time of the incident.

2. *Defense Case*

Escalera was the only defense witness. While leaving the store, he said he saw a car with its window down and a purse inside. He admitted reaching into the car, taking the wallet, and returning to his van. However, he insisted he had not seen the girls, either at the time of the theft, or as he walked back to his van. He maintained he had said nothing to J.D.1 and denied struggling with her or resisting her efforts to open the van door. He denied hearing the girl screaming at him to give back the wallet or her telling anyone to call 911. Instead, Escalera testified that, as soon as J.D.1 opened the van door, he returned the stolen wallet to her.

As for the inconsistent statements he had made to Detective Silva, Escalera denied or did not recall making them. He admitted he later altered his appearance, and that he fled the scene because he was afraid of being caught.

The trial court permitted Escalera to be impeached with a prior felony conviction. When asked, "Is it true that in the past you have been convicted of a felony crime involving moral turpitude?" he answered, "Yes."

DISCUSSION

1. *Escalera Has Not Shown His Trial Counsel Was Ineffective for Failing to Object to the Prosecutor's Closing Arguments*

Escalera argues his trial counsel was constitutionally ineffective for failing to object to portions of the prosecutor's closing argument in which he discussed how

three inapplicable theories might be used to convict Escalera of robbery. We are not persuaded.

A. *Robbery*

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of *force or fear*." (§ 211, italics added.) "It is the use of force or fear which distinguishes robbery from grand theft from the person." (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1707.)

"Force" for purposes of robbery is not synonymous with physical assault. (*People v. Mungia, supra*, 234 Cal.App.3d at p. 1708.) "When *actual* force is present in a robbery, at the very least it must be a quantum more than that which is needed merely to take the property from the person of the victim, and is a question of fact to be resolved by the jury taking into account the physical characteristics of the robber and the victim. [Citations.] The force need not be applied directly to the person of the victim." (*People v. Wright* (1996) 52 Cal.App.4th 203, 210; cf. *People v. Mullins* (2018) 19 Cal.App.5th 594, 609 [relative sizes of the defendant and the victim may itself establish force].)

'"Fear"' is defined as '"[t]he fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or, [t]he fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery."' (§ 212; *People v. Morehead* (2011) 191 Cal.App.4th 765, 771.)

'"The element of fear for purposes of robbery is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for his property.' [Citations.] It is not necessary that there be direct proof of fear; fear may be inferred from the circumstances in which the property is taken. [Citation.] [¶] If there is evidence from which fear may be inferred, the victim need not explicitly testify that he or

she was afraid. [Citations.] Moreover, the jury may infer fear "'from the circumstances despite even superficially contrary testimony of the victim.'"" (*People v. Morehead, supra,* 191 Cal.App.4th at pp. 774-775.)

Robbery includes an act of asportation with the stolen property, and any force or fear used to aid this act, or to resist efforts of the property owner to recover the stolen item, converts a theft into robbery, regardless of how the initial taking occurred. (*People v. Estes* (1983) 147 Cal.App.3d 23, 28 (*Estes*).) Since "[t]he crime of robbery includes the element of asportation, the robber's escape with the loot [is] considered as important in the commission of the crime as gaining possession of the property." (*Id.* at p. 27.) An *Estes* robbery "occurs where a perpetrator achieves possession of the property in the victim's immediate presence *without* the use of force or fear, then uses force or fear during asportation in order to retain possession of the property." (*People v. Hodges* (2013) 213 Cal.App.4th 531, 540.)

Escalera correctly asserts the sole issue at trial was whether he used force or fear in taking or attempting to keep Grace R.'s wallet, i.e., whether he committed a robbery, or just a simple theft. If the jury believed J.D.1, the delivery driver, and Detective Silva, there was evidence legally sufficient for the jury to convict Escalera of robbery.

B. *Ineffectiveness of Counsel*

Escalera argues the prosecutor erred during closing argument by offering the jury three inapplicable theories as to how he might be convicted of robbery. He concedes the prosecutor's fourth theory, the *Estes*-type forcible taking we described above, was "valid," admitting "[i]f the jury unanimously believed [J.D.1's] testimony that she had a tug-of-war with [Escalera] when she tried to open his van door, this was a valid theory of force for robbery."

Escalera acknowledges his trial counsel did not object to the prosecutor's arguments. He also concedes a prosecutorial misconduct claim on appeal will be deemed forfeited unless there was a timely objection on the same ground, and a request for the jury to be admonished. Perhaps fearing such a forfeiture, Escalera reframes the issue, arguing his trial counsel was ineffective for failing to object. He maintains the prosecutor's closing arguments prejudicially infected the single valid theory of robbery with the three incorrect alternative theories to such a degree that trial counsel's failure to object entailed constitutionally ineffective assistance.

(i) *Background*

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 689 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*).)

"'Surmounting *Strickland*'s high bar is never an easy task.'" (*Harrington v. Richter* (2011) 562 U.S. 86, 105 (*Richter*), quoting *Padilla v. Kentucky* (2010) 559 U.S. 356, 371.) This is because "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation.] . . . It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" (*Richter, supra*, 562 U.S. at p. 105.)

To establish the prejudice prong, "[i]t is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" (*Richter, supra*, 562 U.S. at p. 104.) To demonstrate prejudice, a defendant must show a reasonable probability he or she would have received a more favorable result had counsel's

performance not been deficient. (*Strickland, supra*, 466 U.S. at pp. 693-694; *Ledesma, supra*, 43 Cal.3d at pp. 217-218.) "The likelihood of a different result must be substantial, not just conceivable." (*Richter, supra,* 562 U.S. at p. 112.) In this context, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694; accord, *Ledesma, supra*, 43 Cal.3d at p. 218.)

"It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) For this reason, "[a] claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

"[T]he burden of proof that the defendant must meet in order to establish his entitlement to relief on an ineffective-assistance claim is preponderance of the evidence." (*Ledesma, supra,* 43 Cal.3d at p. 218.) We review trial counsel's performance with deferential scrutiny, indulging a strong presumption it falls within the wide range of reasonable professional assistance, recognizing the many choices attorneys make in handling cases and the danger of second-guessing a trial attorney's decisions. (*People v. Maury* (2003) 30 Cal.4th 342, 389 (*Maury*); *Strickland*, *supra*, 466 U.S. at pp. 687-688, 694.)

"Tactical errors are generally not deemed reversible, and counsel's decisionmaking [is] evaluated in the context of the available facts." (*Maury, supra*, 30 Cal.4th at p 389.) '"Whenever we are asked to consider a charge that counsel has failed to discharge his professional responsibilities, we start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge

those duties. The burden of demonstrating the contrary is on his former clients."' (*United States v. Cronic* (1984) 466 U.S. 648, 658, fn. 23.)

Relating these standards to this case, "the decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one" (*People v. Padilla* (1995) 11 Cal.4th 891, 942, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.), and "a mere failure to object to . . . argument seldom establishes counsel's incompetence." (*People v. Ghent* (1987) 43 Cal.3d 739, 772; see also *People v. Kelly* (1992) 1 Cal.4th 495, 540 [an attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel].)

(ii) *The Prosecutor's Closing Arguments*

In his initial closing argument, the prosecutor stated: "[F]rom the time [Escalera] takes the [wallet] . . . until he gets away with it, the robbery is still ongoing. So whether he uses that force or fear to get the wallet in the first place or in his act of escaping and trying to carry the property away. If at any point during that entire process he uses force or fear against the victim, it is a robbery. . . . [¶] . . . [¶] So with him starting with [his] intent to steal [the wallet], any of these actions from that point *to the point he gives the wallet back* ultimately, force or fear at any point during that spectrum, that is a completed robbery." (Italics added.) This argument correctly informed jurors that force or fear must be used before the victim's property is retrieved in order to constitute robbery.

The prosecutor then described his alternative theories for how a robbery could have been committed. Escalera argues the prosecutor here misstated the facts. Trial counsel objected to some of these statements, averring the prosecutor had "misstate[d] the evidence." In response, the trial court admonished the jurors:

"[N]othing the attorneys say is evidence. Their remarks are not evidence. Only what you hear from the witnesses from the stand or admitted exhibits are evidence."

In his closing argument, defense counsel concluded, "I think this case is about whether or not holding [the van] door closed is applying force to that child, and I don't think that would be a proper use of the English language." In other words, his strategy was to focus on the prosecutor's strongest theory of robbery and argue the evidence did not prove it.

In his rebuttal, the prosecutor told the jury there are "four different points that I believe you could find, either force and/or fear was used, and if at any point any of the four of them have been proven to you beyond a reasonable doubt, the defendant is guilty of robbery." His first point was a "fear" theory of intimidation before Escalera took the purse off the seat. The second point was the "force" theory involving the struggle with the van door. The third was a "fear" theory based on J.D.1's fear during her struggle with Escalera.

The fourth point was a legally incorrect "fear" theory, based on Escalera's conduct *after* he had relinquished the purse to J.D.1. In conclusion, the prosecutor told the jury: "If at any of these points you believe that the defendant used intimidation, force or fear from the time he took that wallet *to the time he pulls out of that [store],* he's guilty of a robbery. (Italics added.) Trial counsel did not object.

(iii) *Discussion*

Jurors need not unanimously agree on a particular robbery theory, so long as each finds a robbery was proven beyond a reasonable doubt. (Cf. *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "'Not only is there no unanimity requirement as to the *theory* of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt.'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1025, italics added.) "'[D]ifferent jurors may be persuaded by different pieces of evidence,

even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'" (*Schad v. Arizona* (1991) 501 U.S. 624, 631-632.)

The crux of Escalera's argument is this reasoning does not apply in a case in which jurors are provided an erroneous theory of liability as an alternative. In other words, even if the jury does not have to agree on the theory of robbery, each possible theory must be legally valid. He argues "[t]he prosecutor relied upon four theories of guilt to support the 'force or fear' element of the crime. However, the evidence did not [factually] support two theories, one was a legally invalid theory, and only one was a valid theory." As a result, he suggests "some of the jurors could have believed that [Escalera] used force, others could have believed that he used fear, and others, that he used fear to accomplish his escape after he returned the purse." And, he concludes, because trial counsel failed to object to the prosecutor telling the jury they could convict on the three erroneous theories, he was denied effective assistance of counsel.

Escalera's argument blurs the distinction between *legally incorrect* theories and *factually inapplicable* theories.

In support of his argument, Escalera cites *People v. Green* (1980) 27 Cal.3d 1, 69 (*Green*), overruled on other grounds by *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3, and *People v. Martinez* (1999) 20 Cal.4th 225, 239; limited in *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129, fn. 1 (*Guiton*). In *Green*, a kidnapping charge could have been based on any one of three "distinct segments of asportation of the victim." (*Guiton, supra*, 4 Cal.4th at p. 1121.) The court found the trial court incorrectly instructed the jury as to one segment, the second was not error, and the minimal distance of the third segment "'was insufficient as a matter of law to support' the kidnapping verdict." (*Ibid*.) The court held: "[W]hen the prosecution presents its case to the jury on alternate theories, some of which are *legally* correct and others *legally* incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general

verdict of guilt rested, the conviction cannot stand." (*Green, supra,* 27 Cal.3d at p. 69, italics added.)

The court revisited *Green* in *Guiton,* and limited *Green* to those situations where the underlying facts do not constitute a crime, regardless of any theory of liability. (*Guiton, supra,* 4 Cal.4th at p. 1129.) The *Guiton* analysis relies on the United States Supreme Court's decision in *Griffin v. U.S.* (1991) 502 U.S. 46 (*Griffin*).

In *Griffin,* the defendant and several co-defendants were charged with a single conspiracy, alleged to have had two target crimes. The jury was instructed that it could convict the defendant "if it found her to have participated in *either one* of the two objects of the conspiracy." (*Griffin, supra,* 502 U.S. at p. 48.) The Supreme Court upheld the jury's guilty verdict, drawing "a distinction between a mistake about the law, which is subject to the rule generally requiring reversal, and a mistake concerning the weight or the factual import of the evidence, which does not require reversal when another valid basis for conviction exists." (*Guiton, supra,* 4 Cal.4th at p. 1125.) "[I]f the evidence is insufficient to support an alternative legal theory of liability, it would generally be preferable for the court to give an instruction removing that theory from the jury's consideration. The refusal to do so, however, does not provide an independent basis for reversing an otherwise valid conviction." (*Griffin, supra,* 502 U.S. at p. 60.)

In *Guiton,* a drug sales case, the court "harmonized" *Griffin* and *Green*: "[T]he rule in *Green* [citation], which we construe as applying only to cases of *legal* insufficiency . . . survives . . . . If the inadequacy of proof is purely *factual,* of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is *legal,* not merely factual, that is, *when the facts do not state a crime* under the applicable statute, as in *Green,* the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (*Guiton, supra,* 4 Cal.4th at pp. 1128-1129, italics

added.) The court concluded that whether the evidence showing the defendant sold cocaine was sufficient was "a purely factual question." (*Id*. at p. 1131.)

Here, the jury was presented with alternative theories for a robbery conviction, two of which Escalera argues were *factually* unsupported, and one of which was *legally* incorrect; the final theory—the "force" theory under *Estes*—Escalera agrees was supported by substantial evidence. The two alleged *factually* insufficient "fear" theories do not require reversal under *Green, Guiton* or *Griffin*, because there is no affirmative evidence showing the jury relied on one of these factually unsupported theories. (*People v. Bollaert* (2016) 248 Cal.App.4th 699, 714.)

The question remaining is whether the prosecutor's erroneous "fear after returning the purse" theory falls under the *Green* rule or the *Griffin* rule. A robbery conviction cannot stand if it was based upon fear engendered by Escalera's conduct *after* J.D.1 had regained possession of the wallet. Escalera maintains this necessitates a strict application of the *Green* rule. We disagree as *Green* error may be harmless. (*Guiton, supra,* 4 Cal.4th at p. 1130.) In this case it was.

"*Guiton* and *Green* are unlike this case in that in each of them, the court presented the state's case to the jury on an erroneous legal theory or theories. In *Green*, the instructions were deficient . . . . [¶] In *Guiton*, too, a theory unsupported by evidence was presented to the jury in the very trying of the case—he was charged with selling cocaine despite a lack of evidence that he engaged in this conduct. Again, the trial court should have modified the instructions in light of this fact. We said, in language equally applicable to *Green*: 'Trial courts have the duty to screen out invalid theories of conviction, either by appropriate instruction or by not presenting them to the jury in the first place. Although the presenting of alternate theories to the jury here does not require reversal, we stress that it was error nonetheless.'" (*People v. Morales* (2001) 25 Cal.4th 34, 43 (*Morales*).)

Here, as in *Morales*, the court did not present the jury with a case premised on a legally incorrect theory. Rather, the prosecutor misstated the applicable law, even though he had earlier discussed the law correctly. In this situation, "such an error would merely amount to prosecutorial misconduct [citation] during argument, rather than trial and resolution of the case on an improper legal basis." (*Morales, supra,* 25 Cal.4th at p. 43.)

The standard under which we evaluate prosecutorial misconduct in this context is whether "it infects the trial with such unfairness as to make the conviction a denial of due process." (*Morales, supra,* 25 Cal.4th at p. 44.) "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. . . . [W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*Ibid.*)

"[W]e presume that the jury relied on the instructions, not the arguments, in convicting defendant. . . . Though we have focused on the prosecutor's closing arguments, we do not do so at the expense of our presumption that 'the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.] The trial court emphasized this rule when, as stated, it instructed the jury to follow its instructions and to exalt them over the parties' arguments and statements." (*Morales, supra,* 25 Cal.4th at p. 47.)

The trial court here repeatedly admonished the jury that attorneys' comments are not evidence. In addition, the jury was instructed both at the outset and also at the end of the trial with CALCRIM No. 222 regarding attorneys' comments. The court also instructed the jury with CALCRIM No. 200, telling them "[y]ou must follow the law as I explain it to you, even if you disagree with it. If you believe that the

attorneys' comments on the law conflict with my instructions, you must follow my instructions." In defining "Robbery" using CALCRIM No. 1600, the court correctly told the jury they must find "the defendant used force or fear to take the property or to prevent the person from resisting." Notwithstanding the prosecutor's remarks, the trial court instructed the jury that, in order to find Escalera guilty of robbery, they had to focus on what happened before J.D.1 regained possession of the wallet and Escalera fled.

"[W]e presume the jury followed the court's instructions over any misstatements of law by the prosecutor." (*People v. Forrest* (2017) 7 Cal.App.5th 1074, 1086.) Here, "the prosecutor's fleeting misstatements of the legal standard . . . were not so egregious as to amount to a denial of due process." (*Id.* at p. 1085.) "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) We find in this case they did not.

Escalera argues this was a close case. We disagree.

This was a classic credibility contest. The jury was presented with a straightforward question concerning who to believe: Escalera on the one hand; or J.D.1, the delivery driver, and Detective Silva on the other. Escalera denied using force to take or keep the wallet, and insisted there was no struggle with J.D.1. He was impeached with his felony conviction. The People's witnesses testified otherwise. After a relatively short deliberation,[3] the jury convicted Escalera of robbery.

Although we do not find Escalera has shown trial counsel's performance was objectively deficient under the first prong, we briefly address the second prong of the ineffective assistance inquiry, because to prevail he must also prove his counsel's purported deficiency resulted in demonstrable prejudice. "[P]rejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for

[3] Roughly two hours.

counsel's unprofessional errors, the result of the proceeding would have been different." (*Maury, supra*, 30 Cal.4th at p. 389; *Strickland, supra*, 466 U.S. at p. 694.)

Put simply, Escalera has asserted prejudicial error but has not satisfied the requirement that he demonstrate his trial counsel was constitutionally ineffective for failing to object to the erroneous portion of the prosecutor's closing argument. After reviewing the entire closing arguments of both counsel, and the court's admonitions and jury instructions, we find there is no reasonable likelihood the jury's verdict would have been different had trial counsel objected to the prosecutor's fleeting remarks about the legally inapplicable "fear" theory of robbery. (Cf. *People v. Clair* (1992) 2 Cal.4th 629, 663.) Accordingly, Escalera has failed to establish ineffective assistance of counsel. (See *Strickland*, *supra*, 466 U.S. at pp. 691-692.)

2. *The Trial Court's Modification of CALCRIM No. 1600 Was Not Prejudicial Error*

Escalera next claims the trial court committed error by adding language to the standard robbery jury instruction related to the meaning of "fear" in a robbery prosecution. We agree, but find the error harmless.

At the prosecutor's request, the trial court added language to the standard robbery jury instruction (CALCRIM No. 1600) related to the "fear" element so that the final instruction included the following: "Intimidation may be established by proof of conduct, words, or circumstances reasonably calculated to produce fear. But it is not necessary that there be proof of actual fear, as fear may be presumed where there is just cause for it." Adding this language, which created a "presumption" in favor of the People related to the fear element of robbery, constituted error.

At oral argument the Attorney General acknowledged the problematic nature of this language, but argued that the language was permissible since here the word "presumed" was the functional equivalent of "inferred." We disagree. To "presume" a fact is not the same as to "infer" the existence of that fact based upon the existence of

other facts. Words matter. Precision matters. At law, a "presumption" is not the same thing as an "inference." Confusing the two in an instructional context, thereby creating a "presumption" that benefits the People so as to lessen their burden of proof, constitutes error.

Nevertheless, we find this error harmless because J.D.1 testified she was in actual fear during the incident.[4] In other words, there was direct evidence of fear in this case, so this is not a case in which fear needed to be inferred—or presumed—circumstantially.

"'A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" (*Boyde v. California* (1990) 494 U.S. 370, 378.) CALCRIM No. 1600's full text told the jury the use of force or fear to take the property or prevent the victim from resisting or regaining was a necessary element of the offense. J.D.1's testimony that she was afraid was not impacted. Given these circumstances, the trial court's addition of the erroneous language was harmless.

3. *The Trial Court's Definition of "Moral Turpitude" Did Not Create Prejudicial Error, Nor Was Trial Counsel Ineffective for Agreeing to It*

Escalera next claims the trial court's definition of the term "moral turpitude" was erroneous and, alternatively, trial counsel's failure to object to the trial court's response to a jury question asking for a definition constituted ineffective assistance. We disagree.

During deliberations, the jury sent out a note asking, "What does 'moral turpretude [*sic*]' mean?" Before responding, the court discussed its options with counsel outside the presence of the jurors: "Not surprising. I get it quite often. So I have three proposed responses, [counsel], responses I've used in the past. Let me read them to you.

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[4] "[Prosecutor]: At the time when this was happening . . . [¶] . . . [¶] [w]ere you scared? [¶] [J.D.1]: Yes."

[¶] The first one is 'moral turpitude is defined as a readiness or willingness to lie,' Option one. [¶] Option two. 'A crime of moral turpitude is one which bears a rational relationship to a witness's readiness to lie.' [¶] That is from [an unpublished case]. [¶] And the last one is 'Moral turpitude constitutes a readiness to do evil, i.e., an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general contrary to the accepted and customary rule of right and duty between people.'"

Defense counsel chose option two, as did the prosecutor and the court. The jury was then told: "A crime of moral turpitude is one which bears a rational relationship to a witness' readiness to lie."

Evidence Code section 785 entitles a party to present evidence to impeach the credibility of any witness, including a criminal defendant. A prior felony conviction that "necessarily involve[s] moral turpitude" is admissible to impeach a witness' testimony. (*People v. Castro* (1985) 38 Cal.3d 301, 306; cf. Cal. Const., art. I, § 28, subd. (f)(4).) Escalera does not dispute that his prior felony conviction involved moral turpitude.

A trial court does not err by characterizing a prior felony conviction as "[a] felony involving moral turpitude" and, as a result, defense counsel has no constitutional duty to object to such a phrasing. (*People v. Ballard* (1993) 13 Cal.App.4th 687, 698, fn. 6.) Escalera provides no contrary authority. He instead disputes the trial court's definition of "moral turpitude," and his trial counsel's acquiescence in one of the court's proposed definitions. He provides us with suggestions for a different definition of moral turpitude, but no authority showing it was error to define it as the court and parties agreed to do here. Indeed, he acknowledges the court's definition was "technically correct."

"Defense counsel need not make futile objections or motions merely to create a record impregnable to attack for claimed inadequacy of counsel." (*People v.*

McCutcheon (1986) 187 Cal.App.3d 552, 558-559.) As such, trial counsel was not ineffective for failing to object to a technically correct definition of moral turpitude.

4. *There Was No Cumulative Error*

In his final claim, Escalera contends the judgment must be reversed due to the cumulative effect of each of his assigned errors on appeal, whether or not individually reversal would be required. "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.'" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) He did.

We have considered each claim of error, whether raised as prosecutorial misconduct, ineffective assistance of counsel, or trial court error. We have concluded either no error occurred, the claim was forfeited, or the claimed error was harmless. Escalera was not deprived of the rights guaranteed him under either the state or federal Constitutions on any ground asserted.

DISPOSITION

The judgment is affirmed.

GOETHALS, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.